

## **Creditors and the Concept of ‘Family Home’**

### (1) Introduction

Should the family home be afforded special protection from creditors? Many would instinctively argue that the family home is a special type of property because it plays such a central role in our everyday lives. However, when attempts are made to translate this impulse towards safeguarding our family homes into clear law and policy, it becomes apparent that the issues surrounding creditors and the concept of family home are complex and complicated by the nature of the interests at the heart of the argument: the ‘family’, the ‘home’, and the commercial claims of creditors. This article considers the practical and theoretical implications of family home analysis on policies governing disputes between occupiers and ‘non-home’ interests, such as those of third party creditors, and asks whether the concept of family home, as currently reflected in English law, provides the most suitable vehicle by which to achieve any ‘special protection’ deemed appropriate.

We know that the idea of ‘family home’ is a significant aspect of the phenomenon of ‘home’, both in the popular consciousness, and in legal domains. For instance, empirical studies focusing on the meaning and values of home have indicated that ‘family home’, as a special type of property, is conceptually significant. The significance of family cuts across many of the values that emerge from qualitative studies on the meanings of home.<sup>1</sup> Inferences extrapolated from occupiers’ responses have included the propositions that: ‘...it is the presence of children and the activity of family life that makes a house into a home.’;<sup>2</sup> and that the family home is: ‘...a projection and basis of identity, not only of an individual but also of the

family.’<sup>3</sup> This may exacerbate the effects of losing one’s home, since the research has indicated that function of home as a ‘place of security and protection’ becomes even more significant to occupiers when the property is a family home shared with children.<sup>4</sup> These associations raise interesting issues concerning the legal protection of the owner-occupied home - a question which is brought into sharp relief is when creditors seek recourse to mortgage possession actions and other remedies to enforce their security interests against domestic property.

If the law is concerned to recognize ‘home’ values in this context, a number of models are available. In some jurisdictions, for example, in certain Canadian provinces and some states of the USA, homestead provisions provide an explicit and systematic scheme of legal protection by exempting the home – to a greater or lesser extent – from the pool of assets which creditors may access to recoup their losses on default. In others, including New Zealand and Ireland, legislation regulates dealings affecting the home by requiring the consent of certain family members in order to validate security, and other transactions. In England and Wales, a more *ad hoc* approach to the protection of home has emerged, with provisions scattered across matrimonial homes legislation, bankruptcy legislation, and provisions dealing with co-owned property or charging orders. While the more explicit approaches attest more obviously to prevailing policy choices, the *ad hoc* nature of policies protecting the family home in English law has tended to obscure their overall effects. However, although the nature and degree of any protection conferred on home occupiers against creditors varies significantly, the instinct to safeguard the home, and to acknowledge that a home is not identical to other types of property, is a common feature.

Nevertheless, within each system, a further dichotomy exists, between policies that seek to protect the *family* home, by focusing on the family unit, often typified by

the conjugal relationship, and those which value home *per se*, thus also recognising the interests of individual occupiers in their homes. Although English law does not systematically treat the family home as a ‘protected territory’, evidence can be found of policies focusing on both *family home* and *home per se*. Between these options, the tendency of both legislature and judiciary appears to favour a ‘family unit’ approach, rather than focusing on the interests of individual occupiers in the *home per se*. This is indicative of the implicit socio-cultural values informing legal decision-making in this area, yet while this proclivity towards a ‘special protection’ for the *family* home is readily comprehensible, it raises a number of significant and controversial issues. First, adopting ‘family home’ as the relevant unit of analysis, rather than ‘occupier of the home’, necessitates a delineation of the relationships that qualify as ‘family’ for these purposes. What’s more, however broadly these relationships might be defined, a sole occupier clearly cannot establish a family home in this context since ‘family’ essentially involves relationships between individuals. This approach also excludes single parents who are sole adult owner-occupiers, living in a property with children. Difficult questions may arise even when a property qualifies as a ‘family home’. By focusing on the collective interests of the family unit it is presumed that family members have a unitary interest in the home. Individual occupiers may have a range of different interests in a single property: one or more of the adult occupiers will be the owner(s); amongst joint owners, at least one, but possibly more, will be the debtor; others may be non-debtor occupiers, including children, who generally have no legal interest in the property. When these interests are aggregated into one ‘family unit’, the individual needs and interests of less powerful family members may be overlooked. This is particularly apparent when the concept of family home is viewed through the lens of feminist theoretical analysis, as the marriage between the concept

of family and the concept of home, twin pillars of the 'private sphere', may be regarded as compounding the gendered nature of the family home.

However, critical analysis of the concept of 'family home' is complicated by the way in which both concepts – 'Home' and 'Family' - tend to be culturally idealized. The idea that the home ought to attract greater protection because it is a meaningful site for family life is a potent one, since: '[t]he home as a social concept is strongly linked with a notion of family - the parental home, the marital home, the ancestral home.'<sup>5</sup> and this has been linked with positive attachments to a property, so that: '... 'home' conjures up such images as personal warmth, comfort, stability and security, it carries a meaning beyond the simple notion of a shelter.'<sup>6</sup> There is a danger, however, that the idealism surrounding 'family home' makes objective analysis of the values that it represents, more difficult to achieve.<sup>7</sup> From a practical perspective, it is argued that the focus on *family* in the English provisions has been unhelpful in avoiding forced sale at the hands of creditors. In addition, the application of a family-oriented framework reinforces an undesirable ethos of female dependency and invisibility within the home. Criticisms of family-centric analysis in this context are also supported by analysis of the relationship between family and home in other disciplines.

The article proceeds to consider whether it would be preferable for any special status conferred on the home in law to be detached from a 'family unit' analysis and rooted in an alternative, individual-oriented framework. Aspects of this individual approach, which recognizes the value of *home per se*, and the discrete interests of individual family members, as well as the value of home to the family as a collective unit, have emerged in recent years when the protection of the domestic property has been discussed by Parliament, by the judiciary, and by the Law Commission. This

article considers the benefits of adopting an individual-oriented approach when framing the legal protection of the home, and argues that recognising the interests of individuals – including individual family members – in their homes would be both theoretically sound, and practically advantageous.

## (2) The concept of home in English law

Since English law has not adopted a systematic scheme for the protection of the (family) home against third parties, it has been suggested that the concept means relatively little in English law.<sup>8</sup> However, although disputes between creditors and occupiers are characterized by a general pro-creditor, pro-sale tendency, there are instances in which the *family home* appears to be regarded as a ‘protected territory’.<sup>9</sup> On other occasions, the interests of *individual family members* become the focus, although the context of the family unit remains necessary. The interests of *individual occupiers* in the *home per se*, rather than the family home, have attracted less attention. This section considers the ways in which the *ad hoc* provisions governing actions against domestic property in English law have shifted between these paradigms, and argues where the concept of family home has prevailed, it has tended to hinder, rather than help, the interests of both individual family members, and the family unit as a whole, when seeking to preserve the home against forced sale.

### (a) *Family Home*

The Matrimonial Homes legislation<sup>10</sup> was initially launched as an initiative to provide systematic protection for the matrimonial or family home, over and above non-family property, as a response to the fact that English law: ‘...[did] not, as does the law in many places (particularly in the USA and Canada), recognize a ‘homestead’ right of the wife, nor does it give the wife of a bankrupt any preference or priority - perhaps it ought to do so...’<sup>11</sup> In the words of Lord Denning, the law should protect the ‘poor

ignorant wife'.<sup>12</sup> When the matrimonial homes legislation was enacted, this protection took the form of conferring a 'right of occupation' on 'non-owning spouses'.<sup>13</sup> However, despite subsequent amendments, these provisions remain limited both in scope and, since the non-owning spouse's rights do not bind third parties unless they have been registered as a charge,<sup>14</sup> applicability.

Nonetheless, where *ad hoc* attempts to confer some legal protection on the home have emerged within general property law principles, the tension between individual and family-oriented perspectives has frequently emerged. One illustration can be found in the seminal decision in *Williams and Glyn's Bank Ltd v Boland* (hereafter *Boland*)<sup>15</sup> and the policy debates that followed. *Boland* concerned the interpretation of section 70(1)(g) of the Land Registration Act 1925, a property law provision designed to protect the interests of *individuals* who occupied property.<sup>16</sup> The implications of section 70(1)(g) in relation to family homes were highlighted by the decision in *Boland*,<sup>17</sup> when the House of Lords refused to grant possession of the family home to a mortgagee following default, because the debtor's wife – who had not been joined in the mortgage transaction - had an equitable interest and was in actual occupation. However, rather than providing a special protection, this merely raised the standard of protection for wives in family homes to the level afforded to all other occupiers.

The decision in *Boland* confirmed that section 70(1)(g) applied equally to *all persons* in actual occupation of property, regardless of their relationship to the legal owner. Previously, although non-spouse co-occupiers had been entitled to claim overriding status under section 70(1)(g),<sup>18</sup> *spouses* who shared occupation of the property had been excluded on the grounds that the wife's occupation was a 'mere shadow' of her husband's occupation.<sup>19</sup> Although this no longer represents good law,

the pre-*Boland* position is a cautionary example of one of the dangers associated with a concept of home that is defined in relation to the family unit in occupation: one partner, typically a female partner, may become 'invisible' to the law, and so left without protection against third party claims. In *Boland*, Lord Wilberforce adopted a pragmatic, gender-neutral, and individualistic approach to the question, stating clearly that: '[o]ccupation, existing as a fact, may protect rights if the person in occupation has rights.'<sup>20</sup> Spouses were no longer barred from asserting their equitable interests in actual occupation as 'overriding interests' merely because of their status as spouses,<sup>21</sup> and the focus of the provision was redirected towards the protection of individual occupiers.

Nevertheless, it is interesting to note the re-emergence of a desire to protect *family* home, rather than *home per se* in policy discourses following *Boland*. When the Law Commission reviewed the implications of the decision, it proposed *limiting* overriding status to *spouses* in occupation, rather than all occupiers on the basis that the law: '...has long recognized the need to protect wives in their enjoyment of their property and the matrimonial property, and has developed a growing regard for their position.'<sup>22</sup> Discussion in the House of Lords followed a similar slant, as Lord Simon argued that the 'integrity' of the family home is 'of great social importance',<sup>23</sup> while Lord McGregor welcomed steps to: '...secure and safeguard the values which society upholds in the institution of marriage and the family.'<sup>24</sup> Although these proposals were withdrawn due to lack of time in the parliamentary calendar, it is interesting to note that when the initiative was re-launched, albeit unsuccessfully, in 1985,<sup>25</sup> the exclusion of 'non-spouse' individuals who occupied the 'family' home, such as: '...grandma, the mother-in-law, and possibly the common law wife'<sup>26</sup> was asserted as an argument against a more narrowly defined provision.

The idea of providing a special protection for the family home also emerged in the context of another property law provision, section 30 of the Law of Property Act 1925 (LPA). Section 30 of the LPA allowed a third party, such as a secured creditor, to apply for the sale of co-owned land. The judicial power to order sale was discretionary, however, since the land was held on a 'trust for sale', the courts generally tended to order sale when it was requested. Section 30 did not make any special provision for family homes, however, in a series of cases the court exercised its discretion to refuse sale on the grounds that the property was occupied as a family home. In *Stevens v Hutchinson*,<sup>27</sup> Upjohn J stated that despite his opinion that the debtor was a 'ne'er-do-well and a waster',<sup>28</sup> unlikely to make good on his debts, a forced sale of the property would be 'unjust' since it would result in turning an innocent wife out of her home. Subsequent cases suggested that the court's tendency to favour sale could be tempered in cases involving matrimonial homes by the fact that: '...the house should be used as a home for the two of them.'<sup>29</sup> When the collateral purpose doctrine was adopted by the Court of Appeal in *Re Evers' Trust*,<sup>30</sup> the court emphasized its: '...great regard [for] the fact that the house is bought as a home in which the family is to be brought up.'<sup>31</sup>

These decisions are suggestive of the court's tendency to treat the family home as a special type of property, with a higher degree of immunity against forced sale by creditors than other properties. Nevertheless, this apparent attempt to confer special status on the family home was ultimately unsuccessful. The failure of this judicial initiative can be attributed, in part at least, to the strong pro-creditor and pro-sale stance that characterizes decisions in this context. In addition, however, it is arguable that one of the weaknesses of the doctrine was its focus on the 'family home', rather than the individual interests of the family members who occupied the property as a

home. The basis of the collateral purpose doctrine was the retention of the property for the purpose for which it had been purchased. When that perceived purpose was occupation by the family unit, the court reasoned, this purpose would only continue to subsist for as long as the family unit remained intact. When one family member left the home, the court held that the family unit and, consequently, the collateral purpose of occupation *as a family home*, no longer existed.<sup>32</sup> The interests of individual family members, and their desire to continue living in the property as a home, were disregarded.

This reasoning was also extended to include cases where the family unit remained intact, but one member of the family incurred a charge against the property, as the court held that this, also, revoked the original purpose of occupation *as a family home*.<sup>33</sup> While it is clearly the case, and arguably appropriate, that ‘family-type’ considerations are less persuasive in the context of disputes involving third party creditors, the use of collateral purpose analysis in the context of creditor applications (albeit without accepting that the purpose survived the transaction) perpetuated the idea that the use of the property as a home was only relevant so long as no individual family member disrupted the continuity of the shared occupation, and no third party transactions took place affecting the property. Ultimately, the irony of the ‘family unit’ approach in the collateral purpose doctrine was that the family home was only protected if there was no dispute to be resolved.

Furthermore, even a successful outcome at this stage could leave the occupiers of the (family) home facing the ultimate prospect of bankruptcy proceedings.<sup>34</sup> When an order for sale was requested by a trustee in bankruptcy, the court typically reasoned from the premise that: ‘[b]ankruptcy has, in relation to the matrimonial home, its own claim to protection.’<sup>35</sup> since the trustee in bankruptcy’s duty to realize

assets for the benefit of the bankrupt's creditors outweighed any possible inclination to safeguard the family home. It is interesting, however, to note the elevation of the *family* home in the enactment of counterbalancing legislative provisions: '...to alleviate the personal hardships of those who are dependent on the debtor but not responsible for his insolvency.'<sup>36</sup> The legislature's concern was with other members of the family unit, since: '...eviction from the family home...may be a disaster not only to the debtor himself...but also to those who are living there as his dependents.'<sup>37</sup>

The focus on dependency rather than the needs or interests of individual occupiers is a significant aspect of the 'family unit' approach. In the bankruptcy context, this reasoning distinguishes the protection of a debtor (the wrongdoer) from the protection of the debtor's dependents (who may be regarded as innocent victims of the bankrupt's default),<sup>38</sup> making it attractive to those who support the idea that home attracts special protection, but are concerned about the merits of elevating a debtor's interests over those of the creditor. When the dependent in question is a child, this framework presents little difficulty, but where partners – usually wives – are concerned, the dependency analysis is problematic. Furthermore, it is clear that a presumption of adult female dependency was at the root of the protection. The debates that preceded the enactment of the Insolvency Act 1986 revealed an intrinsic assumption that the male partner would be the bankrupt, and that the female partner and any children would be dependent on the male partner.<sup>39</sup> The continual use of the feminine person was accompanied by an assumption that, in the event of repossession, *she* would be more severely affected: '...*she* risks not only losing the income from *her* breadwinner and facing the humiliation that bankruptcy inevitably brings, but *she* will be penalized in practice more heavily than almost anyone else by losing the

matrimonial home.’<sup>40</sup> The personal hardships attendant to bankruptcy: anxiety, financial straits and social consequences; were regarded as acting more on the female dependent than the male bankrupt, thus implying the proposition, heavily criticized by feminist theorists,<sup>41</sup> that the home is the woman’s domain, yet she remains dependent on a male breadwinner to provide.

However, even within this family home provision, elements of a more individualistic model are discernible. Section 336 of the Insolvency Act 1986 provided that when dealing with a dwelling house comprised in the bankrupt’s estate in which a spouse has registered rights under the matrimonial homes provisions, or where the bankrupt and his spouse or former spouse held the property as trustees for sale,<sup>42</sup> while section 335A made similar provision for property that was co-owned under a trust of land.<sup>43</sup> In each case, when exercising its discretion to sell the bankrupt’s family home, the court was directed, when exercising its discretion to order sale, to make such order as it thinks just and reasonable having regard to a range of factors including the needs and financial resources of the spouse or former spouse, and the needs of any children. This provision does enable the court to recognize individual interests, although the property must first be identified as a ‘family home’ – that is: ‘...a dwelling house which is or has been the home of the bankrupt or the bankrupt’s spouse or former spouse...’<sup>44</sup> The reference to the needs of children as individual stake holders in the home is preferable to subsuming, at the risk of obscuring, their interests within the family unit, but the benefit of the bankruptcy provision is limited in a number of respects.

Firstly, case law on the exercise of the court’s discretion under sections 336 and 335A of the Insolvency Act 1986, indicates that overarching pro-creditor position of the English courts has been persistently decisive: the circumstances must be

exceptional before a court will refuse to order sale,<sup>45</sup> and only the most extreme situations – not including the mere presence of children<sup>46</sup> - have been regarded as exceptional, and so justified *delaying* the sale of the family home.<sup>47</sup> Although the degree of protection conferred on the ‘family home’ by sections 336 and 335A is limited, it is also significant to acknowledge that the scope of any purported protection is curtailed by the threshold requirement of a ‘family home’, defined by reference to the bankrupt and the bankrupt’s *spouse*. Although it might be argued that the need to establish a ‘family home’ before the court’s discretion arises provides a convenient means of determining which individuals should be included within any protection, one consequence is that the court has no discretion to take account of the needs of children living in non-marital families, however exceptional the circumstances may be. Although the court can consider the needs of particular *individuals*, the discretion only arises in a *family home* context.

A further illustration of the difficulties underpinning the application of the concept of family home can be found in the charging orders context. The Charging Orders Act 1979 provided a legal route through which an unsecured creditor could secure a debt on the debtor’s property, *ex post facto*, thus acquiring the status of secured creditor. Significantly, with the status of secured creditor comes *locus standi* to request an order for the sale of the property.<sup>48</sup> The acquisition of a charging order, which is clearly a significant step towards forcing the sale of the property, lies within the court’s discretion. The notion that *family* homes should attract special protection is indicated in a line of authorities identifying *matrimonial* occupation as a relevant factor in the exercise of this discretion. The tendency towards *family* home analysis in this context highlights, once again, the implications of focusing on *family status* rather than *individual occupiers’* interests. These issues were most clearly brought out in

*Harman v Glencross*,<sup>49</sup> where Ewbank J described Mrs Glencross - who was a joint owner of the property as well as an occupier and the debtors' spouse - as having a claim on the basis of her status as a wife. As a wife, the court held she had a: '...common law...right to be maintained and housed during the marriage...'; a right which: '...arises from the status of the marriage itself.'<sup>50</sup> The Court of Appeal concurred with this analysis, and accepted Mrs Glencross's status as a spouse, and the fact that the property concerned was a matrimonial home,<sup>51</sup> as part of the 'personal circumstances of the debtor'.<sup>52</sup> The court focused on Mrs Glencross's position as the debtor's wife, and therefore his dependent, rather than the fact that she was a co-owner and an occupier of the property in her own right.<sup>53</sup> Although the reasoning was clearly influenced by the court's desire to protect the matrimonial home, it seems odd, particularly in the context of a property law provision, that her interest was represented in terms of gender and marriage, rather than her own property ownership or independent occupation. The philosophy of dependency underpinning this approach was further highlighted in Balcombe LJ's suggestion that sale of the property should generally be postponed until: '...her death, remarriage, voluntary removal from the premises or becoming dependent on another man...'<sup>54</sup>

(b) *Family Home: Themes and Issues*

Across the gamut of these creditor/occupier contests, a number of common themes emerge. Although disputes are generally determined according to general property law provisions, the policies which have emerged in their application reveal the 'added value' implicitly attached to *family* homes. However, the discussion above has also revealed a number of practical weaknesses in this analysis, along with some broader difficulties associated with the rationale of the family home framework. Firstly, a focus on *family* home requires a definition of 'family'. The specific policies

discussed above generally correlate ‘family home’ with ‘matrimonial home’ – a property occupied by *spouses*. The matrimonial homes provisions, the pre- and post-*Boland* discourses, and section 335A of the Insolvency Act 1986 all defined a ‘family home’ as a property occupied by spouses. This bias towards *matrimonial* rather than a more broadly defined *family* home, or, indeed, *home per se*, was also evident in the case law pertaining to charging orders, which based the protection of the debtor’s wife on her status as a spouse, rather than her occupation of the property as a home, or, indeed, her ownership interest.<sup>55</sup> A cynical commentator might suggest that the exclusion of non-marital families from these policies has not been highly significant, owing to the general ineffectiveness of these ‘protections’ against third parties. Nevertheless, from a conceptual as well as a practical perspective, the narrow view of family adopted for these purposes raises a number of crucial issues.

One such issue concerns the prevalence of dependency arguments in the bankruptcy and the charging orders provisions. This paternalistic view of a dependent woman, supported by a breadwinning man, is rooted in the legal disabilities historically imposed on married women, who could not hold property in their own right and were rendered dependent on the common law duty of a husband to maintain his wife. Although protectionist approaches can sometimes be justified as ‘redressing the balance’ of social and economic inequality,<sup>56</sup> Bottomley has argued that: ‘...whilst we must recognize the structural inequalities that women suffer from, any legal strategies developed as an attempt to mitigate this must not reproduce models of dependency.’<sup>57</sup> In family property terms, this can be characterized as the choice between recognizing the economic vulnerability of women, and so regarding the husband’s property in ‘more familial terms’, and treating women and men within family units as separate individuals, with independent interests and claims to the

property.<sup>58</sup> The application of family unit analyses in domestic property disputes have tended to cast the ‘poor innocent wife’ as a dependent, and while this approach could be potentially useful when considering the needs of children, in the case of adult occupiers it is undesirable.

A further criticism to be made of the focus on *family unit* rather than *individual occupiers of the home* - whether within a family context or not – is the tendency of policies regulating protection of the owner-occupied home to render certain individuals – often the debtor’s wife and/or children – ‘invisible’ in the eyes of the law. The ‘collateral purpose’ doctrine in the context of orders for sale of the family home illustrated this effect. When developing and applying the collateral purpose doctrine, the court focused on the purpose of occupation as a *family home*. This focus on the family unit, rather than on individual family members, meant that once one partner (the husband) had left the home, the family unit was broken. Consequently, family members who remained in the home could not argue their individual independent status as occupiers of the property.<sup>59</sup> Even where the husband had not left the home, but had incurred a debt secured against his interest in the property,<sup>60</sup> this action was regarded as defeating the collateral purpose of occupation as a family home. ‘Family unit’ analysis also implicitly presumes that ‘the family’ has a coherent, unitary interest in the family home, although this will clearly not always be the case.<sup>61</sup> A presumption that the family unit has a single collective interest in the home runs the risk of rendering individuals within the family, particularly less powerful family members – including children - invisible, leaving their interests overlooked and unrepresented.

(c) *Home per se*

Although the tendency to elevate *family* home over home *per se* has limited the extent to which English law has protected the individual occupier's home, a few developments in recent years have suggested that this perspective is not altogether absent, and may be suitable for future development. The individualistic 'home per se' perspective recognizes that the (family) home is a special type of property, which ought to be protected over and above other types of property, because of the nature of the attachment which occupiers have to their homes, revolves around the relationship between the occupier and the property, rather than the relationship between occupiers *inter se*. Research on the meanings of home emphasizes the attachments that develop between individuals and their homes. Family status analysis, on the other hand, focuses on, and takes as its trigger, relationships between people, rather than a relationship between the person and the property. The *home per se* model was recently endorsed by the Law Commission for England and Wales in *Sharing Homes*.<sup>62</sup> The Commission described its project as: '...centered on a belief in the importance of the home as property. The home is unique. It is the place where life is lived, it is the focus of the family, and the centre-piece of their communal security.'<sup>63</sup> Although the importance of family was recognized as a contextual aspect of home, the core principle of the project was: '...a belief in the importance of the home as property.'<sup>64</sup>

The idea that home is not identical to other types of property also underpinned the Trusts of Land and Appointment of Trustees Act 1996, which replaced the trust for sale, previously imposed on all jointly owned property, with a trust of land. The trust for sale presumed that the principal purpose of owning land was: '...as an investment rather than as a home, to be bought and sold as market conditions demand, with the beneficiaries being interested in the proceeds of sale rather than the property

for its own sake.’<sup>65</sup> The shift to a trust of land was intended to acknowledge that: ‘...most co-ownership of property is for the purpose of providing a home rather than for an investment.’<sup>66</sup> The 1996 Act recognised the likelihood that jointly owned property was bought for occupation as a home, and the guidelines accompanying the court’s discretion to regulate the trust included ‘the purposes for which the property was acquired’. Evidence to date concerning the exercise of this judicial discretion has not, however, suggested that the interests of individual occupiers are likely to prevail over the ‘non-home’ interests of third party creditors requesting sale.<sup>67</sup> Indeed, despite references to the use of property as a home in the debates preceding the 1996 Act, the idea of conferring special status on property because it is occupied as a home has not generally been translated into a significant protection in the context of orders for sale.

One possible exception, however, arises in cases involving child occupiers. The discretion to order sale set out in section 14 of the Trusts of Land and Appointment of Trustees Act 1996 is accompanied by guidelines set out in section 15, directing the court to have regard to: “...the intentions of any person (or persons) who created the trust; the purposes for which the property subject to the trust is held, the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and the interests of any secured creditor of any beneficiary.” Nevertheless, in *Bank of Ireland Home Mortgages Ltd v Bell*,<sup>68</sup> the Court of Appeal reversed a decision of the lower court, which had included the fact that the property was purchased as a family home, and occupied by the bankrupt’s former wife and child as relevant factors, along with the poor health of the bankrupt’s former spouse, to be taken into account when considering whether to order sale. The Court of Appeal held that the intention that the property should be held on trust as a

matrimonial home was irrelevant since Mr Bell had left the home, so that it was no longer a 'family home' when the bank sought possession. Although the interests of the children were not argued separately, it appeared that, notwithstanding the specific reference to the welfare of children in section 335A, the 'family unit' framework had been carried across through the reference to 'the purposes for which the property subject to the trust is held', and precluded consideration of the individual interests of Mrs Bell and the children after Mr Bell had left the property.

The recent decision in *Edwards v Lloyd's TSB Bank plc*,<sup>69</sup> has suggested, however, that 'the interests of minor occupiers' may carry more weight than erstwhile appeared to be the case, in arguments against sale. In *Edwards*, the court postponed the sale of the disputed property after balancing the interests of the debtor's children in staying in their home against the creditor's request for sale of the property. The decision in *Edwards* also suggested that, under the trusts of land legislation, in cases involving children, the original intentions of the parties may carry some weight. Furthermore, although one of the original parties – Mr Edwards – had left the family home, Park J held that the object of the trust was: "...no doubt to provide a matrimonial home for the husband, Mrs Edwards and their children."<sup>70</sup> and that this purpose continued to operate, notwithstanding the existence of the charge or Mr Edward's departure from the home. The presence of children kept the original purpose alive, since the court held that: "[i]n part that purpose has gone, because the marriage is over, but in part the purpose still survives because the house is still the home for Mrs Edwards and the two children of the former marriage."<sup>71</sup>

Although this case suggests that the child occupier's interest in the property *as a home* is generating more support within the exercise of judicial discretion, it is a matter of some concern that although not directly linked to 'family status' or a family

context, since the trusts of land legislation govern actions by creditors against co-owned land but not solely owned property, neither the guidelines in section 15, nor the decision in *Edwards* are relevant where single adult households are concerned. Although Mrs Edwards had become a single parent by the time the dispute arose, her co-ownership with her ex-husband triggered the trust of land. On the other hand, where property is owned by a single individual, including a single parent, third party actions against the property are governed by a separate set of principles. When dealing with solely owned property, a mortgagee has two principal options: to conduct an out-of-court sale, where the procedural criteria are satisfied,<sup>72</sup> or, where this cannot be achieved, to seek a judicial order for the sale of the property.<sup>73</sup> When the requirements for an out of court sale are satisfied – briefly, that the mortgage was made by deed, that the legal date of redemption has passed, and that one of three breaching events has taken place to render the power of sale actionable – the occupiers have no opportunity to defend the sale, and, as discussed below, must attempt to postpone the possession proceedings instead.

When a judicial sale is requested, the court has an unfettered discretion to order sale, notwithstanding the objections of any person, and it has been suggested that: ‘[i]n exercising its discretion the court is not limited to considering financial matters, but can also take into account social considerations.’<sup>74</sup> In *Polonksi v Lloyd’s Bank Mortgages Ltd*,<sup>75</sup> for example, the court ordered sale notwithstanding the mortgagee’s objections that the sale of the property would not suffice to discharge the debt, because the mortgagor had social reasons for wanting to move to a different area. The mortgagor in this case was a single mother with two small children in a solely owned property, and her reasons for wishing to move included her concern that the area she was living in was rough and undesirable, and the belief that a different

area would provide better schooling opportunities for her children and better job prospects for herself. While this authority suggested that the court might, in circumstances of this nature, take account of the needs of the mortgagor and her children, the decision in *Polosnki* is significantly different from that in *Edwards*, since Mrs Polonki was arguing in favour of sale,<sup>76</sup> while Mrs Edwards wanted to avoid the sale of the home. For a child in a solely owned property, the fact that the property is their home has not yet emerged as an argument against sale.

Nevertheless, whether the creditor has an automatic right to sell the property or the court orders sale, the occupier may still defend the *possession* proceedings under section 36 of the Administration of Justice Act 1970. Section 36 conferred discretion on the court to delay repossession for a limited period of time, where the disputed property is a dwelling-house and: ‘...it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage...’.<sup>77</sup> This provides a rare example of a legal context where (what are in substance) home considerations are taken into account. It is important, however, to bear in mind, that the conditions for the exercise of this discretion are strict. The court will not refuse immediate possession unless the debtor can show that they have the financial capability to make good on arrears within a ‘reasonable time’ whilst continuing to meet installments as they fall due.<sup>78</sup> Consequently, although section 36 appears to acknowledge the value of *home per se*, the court’s discretion is not a general discretion, under which ‘home-oriented’, or social factors might be taken into account, but is limited to an assessment of the economic likelihood that the debtor will make repay any sums due within a reasonable time.

### (3) The ‘marriage’ of family and home

The previous section considered the ways in which English law has responded to arguments in support of the *family home*, or even *home per se*, albeit within an *ad hoc* framework. It is suggested that although the tension between these approaches has emerged at various junctures, English law has, traditionally, implicitly preferred the idea that *family home* should be protected, over an above *home per se*. Nevertheless, a number of practical and theoretical criticisms have been made of this approach, ranging from the definition of the ‘family unit’, the exclusion of single adults, differential approaches towards children, to the assumptions the family approach makes about relationships within the home. The following section builds on this analysis by arguing that far from being an obvious or automatic association, the concept of family home is the product particular outmoded cultural precepts. Finally, it will be argued that a more individualistic ‘*home per se*’ approach would provide a more appropriate modern basis on which to construct any legal protections for domestic property.

Although the etymology of words relating to family and to home tends to suggest a long-standing and almost instinctive association between the concepts:<sup>79</sup>

[o]ver historical time...‘family’ and ‘home’ were overlapping concepts, but were by no means identical. The close identification of home with family is a relatively recent phenomenon that can be traced to the late eighteenth or early nineteenth century. The concept of the home as the family’s haven and domestic retreat emerged only about one hundred and fifty years ago, and was, initially, limited to the urban middle classes.<sup>80</sup>

This modern concept of family home, in the sense of *home as a private space for the family* was derived from bourgeois family values,<sup>81</sup> and was strongly influenced by gender roles: ‘[t]he home represented security and comfort, the woman within it was

the 'Perfect Lady', the idealized feminine wife/mother, the homemaker, the pure and womanly woman.<sup>82</sup> Home was regarded as an archetypal 'private space',<sup>83</sup> within which a husband provided for his wife and family under a duty of support which was both gender-specific and patriarchal.<sup>84</sup>

Although it might be thought that the nineteenth century concept of family home is no longer relevant to modern discourse, Wright's analysis of the contemporary 'home model'<sup>85</sup> across a range of cultural contexts testifies to the continuing influence of ideals and expectations relating to family, gender, class on attitudes towards home. Webster's work<sup>86</sup> on the significance of home in relation to gender, race and identity in Britain highlighted an additional head of inequality, as the ideal of 'family home' was, on the one hand, imposed on white women,<sup>87</sup> yet unavailable to black women.<sup>88</sup> Such disparities in the availability of the culturally cherished ideal of 'family home' continue to raise important questions about the value of retaining the concept as a central organizing theme of legal discourse. Contemporary analysis of the concept of family home must of course address the current debate surrounding the definition of 'family'. This debate has raised major legal and social policy issues, as arguments have been advanced in support of a more inclusive approach towards family status, based on a more functional analysis of the family unit. The current shift towards more inclusive approaches to family law in England and Wales is reflected in the proposals for Civil Registered Partnerships for Same-Sex couples,<sup>89</sup> and the Law Society for England and Wales's proposals for greater legal recognition of cohabitation.<sup>90</sup> In relation to family property, both sets of proposals focus on claims between partners, particularly those arising at the termination of relationships. In this relational context it is natural and appropriate that

the legal framework adopted is a family-oriented approach, however the remit of the family unit is defined.

However, the subject of third party claims to domestic property raises different issues which would, it is argued, be more appropriately resolved within an individual rather than family-unit perspective. The individualist model focuses on the relationship between individual occupiers and their homes rather than the (gendered, or dependent, or narrowly defined) relationship between the occupier and the owner/debtor. Property theory has traditionally attached weight to the interests of individual occupiers:<sup>91</sup> it has been argued that: ‘...to achieve proper self-development – to be a *person* – an individual needs some control over resources in the external environment.’;<sup>92</sup> and that: ‘[m]ost people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.’<sup>93</sup> Analysis of judicial approaches towards various disputes was also applied to illustrate the argument that some types of property, for example the home, are implicitly regarded as more worthy of protection than others, as ‘property for personhood’, so that they: ‘...give rise to a stronger moral claim than other property.’<sup>94</sup> Since the link between the person and the property is ‘personal’, this theory is necessarily concerned with individual interests arising by virtue of the individual’s relationship with the property. This again adds weight to the argument that, when dealing with security of tenure and attachment to home, the relevant relationship is that between the individual and the property, rather than relationships between individuals, for example within a family setting.

A more individualist approach would not only provide a more appropriate framework for any ‘home’ protection, but would also avoid the difficulties inherent to

defining ‘family’ for the purposes of family home. The application of a ‘family unit’ framework necessarily excludes single people, as well as ‘non-family’ households. Aside from the obvious practical and social implications of such exclusions, the legal endorsement of this approach in the context of policies protecting the home undermines the importance of *home* for individual occupiers. Although *family* has emerged as a significant aspect of home meanings for occupiers,<sup>95</sup> and may ‘add value’ to the concept of home, it is not an essential attribute. Many of the values of home – for example, shelter, security, privacy, identity – can be equally valued by those who fall outside the legal definition of ‘family’, either because their relationship does not meet particular criteria, or because they live alone. Furthermore, sole occupiers may be even *more* dependent on the meanings of home, such as identity, security and continuity, than those living together within a family. The existence of close relational ties within a family could enable them to bring many of their ‘home values’ – for example, family life, a sense of belonging, security, continuity and identity – to a new property.<sup>96</sup> On this reasoning, it is perhaps arguable that since, in the absence of family, a single individual’s personal identity may be more closely bound to the property itself, the occupation of a particular property could be even more meaningful for single dwellers, and therefore ought to attract even greater weight.

#### (4) Alternative approaches: Homestead legislation

In some jurisdictions, ‘homestead’ provisions have been developed to confer systematic legal protection on domestic property against third parties. These policies explicitly recognize the home as a site of special significance, yet although the label conferred on such policies suggests that it is ‘home’ *per se* which attracts the relevant protections, in reality, these policies have traditionally safeguarded only the ‘*family*

home' against external third party claims. In New Zealand, the Joint Family Homes Act 1964 was intended to protect the family home against third parties. This protection must be triggered by registration, and only *spouses* can register, but once a property is registered, a degree of immunity is provided against the claims of creditors, up to a maximum sum.<sup>97</sup> In Canada, third party claims are controlled by legislation in Ontario,<sup>98</sup> British Columbia,<sup>99</sup> Alberta,<sup>100</sup> Manitoba,<sup>101</sup> New Brunswick,<sup>102</sup> Prince Edward Island,<sup>103</sup> Quebec<sup>104</sup> and Newfoundland,<sup>105</sup> which generally enables non-transacting *spouses* to prevent unilateral dispositions of the family home without their consent. A 'homestead-type' protection was also enacted in Ireland by the Family Home Protection Act 1976, which was designed to protect the family home against dispositions by one *spouse* without the consent of the other.

The legislative policy backgrounds of these provisions highlight once again the implications of the association between family and home. In Ireland, for example, the Family Home Protection Act was informed by the Irish Constitutional provision<sup>106</sup> that aspires to protect the home as the seat of the family. The basis for this association between home and family is the presumption that: '...by her life within the home, woman gives to the State a support without which the common good cannot be achieved.'<sup>107</sup> The overtly gendered reasoning behind this protection is clearly associated with the idea of the home as 'a woman's place'. In New Zealand, also, the Joint Family Homes system was intended to: '...to ensure a degree of security for the family home, particularly against the claims of creditors.'<sup>108</sup> However, although these protections were 'home-oriented' – that is, they focused on the relationship between the occupier and the home, rather than the relationship between the occupiers – the 'home' protection was by and large restricted to spouses, thus excluding both non-qualifying family members and single people. This approach was

partially challenged in the Canadian province of Nova Scotia, where the Matrimonial Property Act 1989 gave homestead rights to spouses only. In *Walsh v Bona*<sup>109</sup> the plaintiff argued that the legislation breached the equality obligation imposed by the Canadian Charter of Rights and Freedoms. Although the enumerated grounds of discrimination in section 15 do not include marital status or sexual orientation, the Canadian Supreme Court has included these as ‘analogous’ grounds.<sup>110</sup> The Nova Scotia Court of Appeal held that this provision was in breach of the equality obligation, and therefore unconstitutional, since it excluded and thus discriminated against cohabitants. The legislature responded by enacting the Law Reform Act 2000, which extended the provisions of the Matrimonial Property Act to include cohabitants, either heterosexual or homosexual.<sup>111</sup>

The solution in Nova Scotia was to widen access to existing family home protections (to a certain extent). The inclusion of conjugal cohabitants does not, however, resolve the issue for other individuals who live in ‘non-family households’ or who live alone. However, in the United States of America, where 46 out of 50 states offer some form of Homestead exemption to protect equity in the home from the general reach of creditors,<sup>112</sup> an interesting alternative model has emerged. The Texas Homestead exemption<sup>113</sup> has provided one of the most generous homestead protections in the US since its inception in 1839 by limiting home-equity borrowing to payment of the purchase price, improvements or taxes due on the property. The interpretative commentary accompanying the Texas Constitution stated that the principal object of the scheme was the ‘protection of the family’. One commentator has highlighted the traditional family-centric approach of the US homestead schemes by suggesting that: ‘[i]n popular as well as legal parlance, homestead means not only

family home but property that is accorded particular protection because it is the family home.’<sup>114</sup>

Nevertheless, judicial *dicta* concerning the application of the Texas homestead exemption suggested that although the scope of the provisions was originally limited to the context of marital families, even in the early years the concept of homestead was not inextricably bound up with the concept of family. This was most clearly established in *Wood v Wheeler*, where Chief Justice Hemphill stated that:

[t]he object of such exemption is to confer on the beneficiary a home as an asylum, a refuge which cannot be invaded nor its tranquility or serenity disturbed, and in which may be nurtured and cherished those feelings of individual independence which lie at the foundation and are essential to the permanency of our institutions.<sup>115</sup>

The values underpinning this *dictum* correlate with many of the values that emerged from empirical studies into individual attachment to the home.<sup>116</sup> Furthermore, the court clearly framed the protection in terms of the *individual's* attachment to the property, rather than the presence of family or relationships between the occupiers of the property. In *Franklin v Coffee*,<sup>117</sup> the purposes of the scheme were described as: ‘...not only to protect citizens and their families, from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals, those feelings of sublime independence which are so essential to the maintenance of free institutions.’<sup>118</sup> Considerable emphasis was placed on the security and independence of individuals, and the importance of protecting their home environments.

This approach has also been reflected in developments – both judicial and constitutional - in the scope of the homestead protection. Although it was initially confined to *family home*, the courts gradually broadened the definition of family,

while the underlying individualist-orientation of the Texas provisions ultimately gave rise to an amendment to the Texas Constitution in 1973, which extended the contexts in which the homestead exemption can apply to include *single adults*.<sup>119</sup> As a result, this homestead provision now comprehensively and systematically protects the homes of *both* individuals and family units. The family unit is identified according to relationships of care and dependence rather than status.<sup>120</sup> Furthermore, even where the ‘family’ home is protected, the central organizing concept is the value of *home per se*: in order to establish ‘membership’ of the family, an individual does not need to show economic support as evidence of a relationship of care and dependence, but use and occupation of the property *as a home*.<sup>121</sup>

(5) Family home or home per se: evaluating the options

When evaluating the legal protection of occupiers in domestic property, it is important to bear in mind the overarching policy trend of English law towards creditor/occupier disputes. Even after the arguments surrounding the protection of family units versus individual occupiers are unpacked, evaluated and rendered conceptually sound, the apparently unshakable pro-creditor stance adopted by the English courts when balancing these claims presents an enduring practical obstacle to real recognition of the value of home in this context. The successful development of a more systematic approach to the protection of the home in law must be premised upon acceptance of the proposition that home has some meaning in law outside its economic value as a source of capital. In Texas, for example, the generosity of the homestead legislation evolved from its historical background as a frontier society, where the value of home *as a home* was recognised, alongside the broader economic consequences of loss of home through repossession:

[t]he homestead exemption...had a three-fold purpose: (1) to encourage colonization, for in a frontier society, each pioneer family was of definite value to the community; (2) to provide the debtor with a home for his family and some means to support them and to recoup his economic losses so as to prevent the family from becoming a burdensome charge upon the public; (3) to retain in pioneers the feeling of freedom and sense of independence which was deemed necessary to the continued existence of democratic institutions.<sup>122</sup>

Homestead provisions in the USA operate by restricting the use of the home as security for the purposes that are not directly linked to the acquisition or improvement of property itself, and exempting the property from actions to recoup other, unsecured debts. The argument that the use of the home as security for business loans should not necessarily be encouraged or facilitated has been raised in the English context.<sup>123</sup> Arguments against the protection of the home in English law have included the assumption that creditors would not lend money if more effective remedies were extended to home occupiers. However, creditors are in the business of lending money, the risk of default is inherent to the nature of that business,<sup>124</sup> and creditors are in a much stronger position than occupiers when it comes to taking steps to protect their interests, particularly when we 'count' children as individual occupiers.<sup>125</sup> Furthermore, the broader social and economic costs of repossession<sup>126</sup> add weight to the argument that the interests of creditors should not be presumed to outweigh the home interests of occupiers, but that their respective interests should be evaluated within a more systematic framework.

The development of a systematic approach would necessitate a more explicit policy in support of *either*: the family unit in a family home; individuals in a family home; or individual home occupiers. From an instrumentalist perspective, the concept

of *family* home is attractive, since the idea[l] of ‘family home’ is a powerfully emotive idiom, with considerable cultural kudos, and, as such, may be regarded as carrying significant weight in policy debates. ‘Family’ is clearly associated with ‘home’ in the popular consciousness, and this is reflected in the tendencies towards *family* home discussed in earlier sections. Furthermore, although the analysis in section 2 indicated that the ‘family’ dimension has been problematic in the legal context of repossession cases, family policy advocates could regard an ostensible ‘rejection’ of the family interest in the home as a high-risk and undesirable strategy, leaving them reluctant to cede any ground here, particularly at a time when the rhetoric of equality is gaining ground in other family policy debates.<sup>127</sup> From a principled perspective, it is also important to bear in mind that empirical research has shown that *family* (in the non-legal sense of the term) is a significant factor in home attachments.<sup>128</sup>

An alternative approach would be to focus on the interests of individual occupiers in their homes. The advantages of individually-oriented rather than family unit-focused approaches to issues of family policy have attracted some debate in recent years. In Britain it has been argued that: ‘[t]he fundamental dilemma for government at the end of the twentieth century has become how far it can or should treat adult family members as independent individuals.’;<sup>129</sup> while the movement towards a more ‘individual rights’ approach for adults and children in family law and policy in the US has been described as: ‘...the most important event that has occurred in family law that has affected family relationships in the last fifty years’<sup>130</sup> From a broad family policy perspective, some concerns have been raised about the appropriateness of individual-oriented approaches in family contexts, where family members may not, in reality, be autonomous individuals.<sup>131</sup> It has been suggested

that: '[a]t first blush, the focus on individual rights may seem to diminish family relationships, perhaps even pitting one family member against another...'<sup>132</sup> Katz argues, however, that the individual-oriented approach to family life can more properly be regarded as a positive recognition of 'individual rights' rather than selfish 'individualism'.<sup>133</sup> In the context of creditor/occupier disputes, an individual rights approach to retaining the home would recognise the interests of individuals who have erstwhile been ignored in the context of such disputes. Since the effect would be to strengthen the claim of the individual family member against an external third-party, rather than to pit individual family members against each other, the effect would be to enhance individual rights, rather than promoting 'individualism' within the family unit.

In one sense, the 'family unit' approach may be regarded as a convenient means to distinguish between 'wrongdoers', ie the debtor him/herself, and 'victims' of the debtor's default, and determining which non-debtor occupiers should be included within any protection. Although the Texas 'individual-approach' extends to single member households – in which case the sole occupier would also be the debtor - the idea of conferring protection on debtors against their own default is unlikely to generate support in this jurisdiction. Nevertheless, the individual-oriented approach could be molded to serve a range of policy ends. For example, if, as a matter of policy, it were considered desirable to prioritise the protection of a debtor's partner and/or children in the home, this could be achieved by an 'individuals in the context of the family home' approach, rather than conferring equal protections on all individual occupiers. As the Law Commission acknowledged in *Sharing Homes*, a systematic framework within which all occupiers are treated the same overlooks the reality that some occupiers seem more deserving of protection than others: '[t]here

can be little doubt that a court would instinctively have greater sympathy for the unmarried mother...than for the child of elderly parents...'<sup>134</sup> Although the traditional 'family unit' analysis has been exclusionary, and children have not counted for the purposes of a property-owning family, the idea of family context could be drafted to take account of meanings of the home to a range of individual occupiers, including partners, single parents, and child occupiers.

A heterogeneous approach towards the legal protection conferred on individual occupiers in their homes could also be justified on the basis that not all occupiers value their homes in the same way. Different individuals may have different levels of attachment to their properties. For instance, Wikstrom's research indicated that while: '[i]n some cases these bonds [to the home] seemed to be so strong, that breaking them by moving would lead to disaster [while] [f]or some young people, the flat was just a place where they slept and stored their belongings.'<sup>135</sup> A more impact-sensitive approach would focus on the effects of repossession and loss of home on the occupier(s), not only from a shelter perspective, but also in relation to psychological and emotional attachment. Alternatively, the relative status of individual occupiers could be approached from a welfare perspective by focusing on those who are regarded as being most in need of protection. This would enable a more individualized approach to be pursued, with any protection based on individual needs and attachment, yet could provide an avenue by which the concerns of family advocates, particularly in relation to children could be met. Children could be counted as 'individuals' for these purposes,<sup>136</sup> as could single people, including, for example, an elderly widowed person living alone or a single custodial parent.<sup>137</sup>

## (6) Conclusions

The home is a site of major importance in people's lives, whether they share their homes with a partner, children, extended family, friends, or whether it is even with a dog, cat or goldfish. When legal processes are called upon to determine whether or not an occupier will lose that home, any decision making should be carried out with an understanding of the complex interests at stake. The home is a special type of property, to which occupiers may develop strong personal attachments. Occupiers value their homes in a range of ways, not only as a source of shelter but as a particular type of territory where interaction with family and friends takes place, inculcating values such as security, privacy, and identity. English law has no explicit scheme to confer special protection on the home, yet the significance of home - or at least the *family* home - is reflected, to some extent, in the *ad hoc* policies discussed above. The desire to protect the *family* home has clearly influenced various aspects of the property law provisions regulating owner-occupied property in the context of default and/or bankruptcy. The close cultural association between 'family' and 'home' seems to have placed the 'family home' at the center of debates and policies concerned with the values of home. The emphasis on *family* home has, however, had significant implications on the nature and effectiveness of policies attempting to safeguard the home, particularly against third parties. The identification of the family home as the unit for protection, rather than the interests of individual occupiers in 'hanging on to their homes', has, however, resulted in policies that are not only ineffective, but also vulnerable to criticisms of gender discrimination and paternalism. Other issues raised by the centrality of the family unit in policies regulating home include the difficulties associated with defining a 'family unit', and the inherently exclusionary nature of any legal definition of family. There is also a further danger that the interests of some

family members, particularly women and children, may be overlooked or even ignored, because of the focus on the family unit rather than individual members of the family. Finally, the ‘marriage’ between the concepts of family and home has historic connotations linked with gender, class and race, which could be regarded as undermining the concept of home as a set of meanings that can be experienced, and valued, by all occupiers.

These criticisms of the ‘family home’ framework must, however, be balanced against empirical research which indicates that changes in family roles and structures have not diminished the association between family and home. Conversely, it is suggested that: ‘[a]lthough the form of the family is undergoing change, the *idea* of family remains fundamental. By its association with family, the home...hold[s] cultural centrality.’<sup>138</sup> The idea of adding value to the meaning of home because of the presence of family is supported by empirical research indicating that *for those who live in a ‘family’ home*, the ‘family dimension’, and particularly the presence of children, are significant elements of the home experience. Saegert and Winkel capture this view in their description of the home as: ‘...the place where the cultural values of individualism and achievement can be laid aside for a time. The family and personal relationships become the focus rather than the individual.’<sup>139</sup> Nevertheless, the proposition that ‘*home equals family home*’ is incomplete. While *family* may be regarded as ‘adding value’ to the meanings of home, many of the values represented by homes: material shelter; security; control; orientation in space; permanence; continuity; privacy; self-identity; are not dependent on the presence of family. These meanings can also be experienced and valued on an individual level and the absence of family does not relegate *home* to a meaningless, valueless entity. Furthermore, cross-cultural research on people’s responses to their home environments has shown

that while: ‘...home can symbolize security and warmth or gender roles and domesticity, or even tyranny through domination or abuse[...]Whatever the concept of home, it is an individual meaning, often *concerned* with family, that is expressed in culturally recognized ways.’<sup>140</sup> Although family values are often associated with home meanings, home remains meaningful for individuals as well. When conceptualizing home, it is therefore important not to lose sight of the meanings of home for individuals, whether within a family unit or not.

There are strong arguments in support of the development of a coherent legal concept of home, which would enable the meanings and values of home to play a role in informing legal decision-making.<sup>141</sup> In the context of disputes between creditors and occupiers, the fact that an occupier is attached to their home may not be regarded as sufficiently significant to justify exempting the home from repossession, or even successfully swinging the balance away from the creditor’s financial claim in all (or many?) cases. Nevertheless, a clearer understanding of the values represented by the home could justify subjecting certain decisions to stricter scrutiny. Although ‘family’ is a key aspect of these home values, it is not the exclusive source of meaning in the home, yet a concept of home that is closely intertwined with family may undervalue the range of individual meanings that home represents to occupiers. On the other hand, a more individualistic approach could still allow for ‘added value’ to be imputed in certain cases, possibly where the individual home occupiers include children. It would be preferable, however, if home values are taken into account in the context of legal decision making, for any weight attributed to *home* to be based on individual attachments to the home. Focusing on the individual’s relationship with the property rather than family status would also enable the legal concept of home to

reflect more accurately the values associated with occupiers' attachments to their homes.

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<sup>1</sup> See for example, J. Fitchen, 'When Toxic Chemicals Pollute Residential Environments: The Cultural Meanings of Home and Home Ownership' (1989)48 *Human Organisation* 313; R.M. Rakoff, 'Ideology in Everyday Life: The Meaning of the House' (1977)7 *Politics and Society* 85.

<sup>2</sup> Rakoff, *ibid* at 93.

<sup>3</sup> J. Pallasmaa, 'Identity, Intimacy, and Domicile - Notes on the Phenomenology of Home' in D.N. Benjamin (ed), *The Home: Words, Interpretations, Meanings and Environments* (1995) at 137.

<sup>4</sup> 'An image of the home as a refuge from the dangers of the outside world has deep historical roots in society, perhaps captured in the mythical pioneer image of the rough cabin on the prairie, in which the husband-father is pictured protecting his family and its new home from the dangers of wilderness life. Though the nature of the perceived dangers has changed over time, the home is still thought of as a haven, where people, especially children, are safe.'; Fitchen, above n 1 at 316.

<sup>5</sup> S. Watson, with H. Austerberry, *Housing and Homelessness: A Feminist Perspective* (1986) at 8.

<sup>6</sup> *ibid*.

<sup>7</sup> '...there is a complex ideology of *home* which includes our expectations and desires...*home* is both an imposed ideal and a potent cultural and individual ideal.'; J. Moore, 'Placing Home in Context' (2000)20 *Journal of Environmental Psychology* 207 at 212.

<sup>8</sup> L. Fox Harding, *Family, State and Social Policy* (1996), Chapter Four.

<sup>9</sup> See, for example, debate in the House of Lords following the decision in *Williams and Glyn's Bank Ltd v Boland* [(1981)AC 489] when Lord Simon argued that the "integrity" of the family home is: '...of great social importance...'; while Lord McGregor argued for the need to: '...secure and safeguard the values which society upholds in the institution of marriage and the family.'; HL Debs vol. 437, col. 640, 653 (15 December 1982).

<sup>10</sup> Matrimonial Homes Act 1967, Matrimonial Homes Act 1983 and Family Law Act 1996.

<sup>11</sup> *National Provincial Bank Ltd v Ainsworth* [1965]AC 1175 at 1256, *per* Lord Wilberforce.

<sup>12</sup> HL Debs vol. 275, col. 45 (14 June 1966), Lord Denning.

<sup>13</sup> Matrimonial Homes Act 1967, subsection 1(1).

<sup>14</sup> Matrimonial Homes Act 1967, section 2. Although the matrimonial homes legislation was subsequently amended to empower 'associated' persons, including former spouses, cohabitees and former cohabitees to apply to the court for orders regulating their occupation of the family home vis-à-

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vis their partners, the registration of matrimonial home rights for the purposes of protection against third parties remains limited to spouses; Family Law Act 1996, section 31.

<sup>15</sup> See above n 9.

<sup>16</sup> Section 70(1)(g) protected the interests of ‘every person in actual occupation of the land’ by conferring overriding status on such interests, enabling them to take priority over subsequent third party interests, ‘save where inquiry was made of such person and the rights are not disclosed.’

<sup>17</sup> Above n 9.

<sup>18</sup> *Hodgson v Marks* [1971]Ch 892.

<sup>19</sup> *Bird v Syme-Thomson* [1979]1 WLR 440.

<sup>20</sup> Above n 9 at 506.

<sup>21</sup> ‘A wife may...have rights of her own...and if she has such rights, why, just because she is a wife...should these rights be denied protection?’; *ibid*, per Lord Wilberforce.

<sup>22</sup> *The Implications of Williams and Glyn’s Bank Ltd v Boland*, Law Com No 115 (1982), para 66.

<sup>23</sup> HL Debs vol. 437, col. 640 (15 December 1982), Lord Simon.

<sup>24</sup> *Ibid*, col 653, Lord McGregor.

<sup>25</sup> Land Registration and Law of Property Bill 1985.

<sup>26</sup> HL Debs vol. 472, col. 752 (13 March 1986), Lord Mishcon.

<sup>27</sup> [1953]Ch 299.

<sup>28</sup> *ibid* at 307, per Upjohn J.

<sup>29</sup> *Stott v Radcliffe* (CA) 19 February 1982; (Unreported, Transcript: Lexis).

<sup>30</sup> [1980]1 WLR 1327.

<sup>31</sup> *Williams v Williams* [1976]Ch 278 at 285, per Lord Denning MR.

<sup>32</sup> *Jones v Challenger* [1960]2 WLR 695.

<sup>33</sup> *Re Soloman, a Bankrupt* [1967]Ch 573 at 581, per Goff J.

<sup>34</sup> *Alliance & Leicester plc v Slayford* [2001]1 All ER (Comm) 1.

<sup>35</sup> *Re Bailey* [1977]1 WLR 278 at 279, per Megarry V-C.

<sup>36</sup> *Report of the Committee on Insolvency Law and Practice*, (Chair: Lord Cork) Cm 8558 (1982)

(hereafter Cork Report) para 1118.

<sup>37</sup> *ibid* para 1116.

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<sup>38</sup> Note, however, that where partners, rather than children, are concerned, this categorization is not unproblematic; it has been suggested that a partner cannot properly be regarded as ‘innocent’ of the debtor’s default in this context since the debtor’s partner must ‘take the bad times with the good’; see, for example, M. Freeman, ‘Wives, Conveyancers and Justice’ (1980)43 *Modern Law Review* 692.

<sup>39</sup> The Law Lords argued for the protection of the: ‘...principal residence of the bankrupt or of *his* spouse or former spouse or any dependent of the bankrupt or of *his* spouse or former spouse.’; HL Bills (1984-5) Nos 29-II, 29-III, 114-I, emphasis added. Lord Meston described the object of the proposals as: ‘...to strengthen the really very weak position of the wife and child.’; HL Debs vol. 459, col. 1263 (7 February 1985) Lord Meston; who were identified as: ‘...the less able victims of bankruptcy.’; HL Debs vol. 459, col. 1262 (7 February 1985) Lord Meston.

<sup>40</sup> HC Debs vol. 78, col. 176 (30 April 1985) Mr John Fraser.

<sup>41</sup> See further, B. Martin, & M. Mohanty, ‘Feminist Politics: What’s Home Got to do with it?’ in T. de Laurentis, (ed), *Feminist Studies/Critical Studies* (1986) at 191; T. de Laurentis, ‘Eccentric Subjects: Feminist Theory and Historical Consciousness’ (1990)16 *Feminist Studies* 115; B. Honig, ‘Difference, Dilemmas and the Politics of Home’ (1994)61 *Social Research* 563.

<sup>42</sup> The trust for sale was automatically imposed on co-owned land by the Law of Property Act 1925.

<sup>43</sup> The trust of land superseded the trust for sale and now governs co-owned land under the Trusts of Land and Appointment of Trustees Act 1996.

<sup>44</sup> Insolvency Act 1986, section 335A(2).

<sup>45</sup> Insolvency Act 1986, section 335A(3).

<sup>46</sup> *Trustee of the Estate of Eric Bowe (A Bankrupt) v Bowe* [1998]2 FLR 439.

<sup>47</sup> *Judd v Brown* [1998]2 FLR 360; *Cloughton v Charalamabous* [1999]1 FLR 740; *Re Raval (A Bankrupt)* [1998]2 FLR 718, where life-threatening illness was considered sufficiently exceptional to justify delaying the order for sale.

<sup>48</sup> See *Stevens v Hutchinson* [1953]1 Ch 30, where Upjohn J distinguished between a judgment creditor who was *not* a ‘person interested’ within section 30, having only personal rights, and a chargee, who, having the same proprietary rights as an equitable mortgagee, would be entitled to apply for sale.

<sup>49</sup> *Harman v Glencross* [1984]3 WLR 759 (ChD); [1986]2 WLR 637 (CA).

<sup>50</sup> *ibid* (ChD) at 764, *per* Ewbank J.

<sup>51</sup> *Harman v Glencross*, (CA) see above n 49 at 648, *per* Balcombe LJ.

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<sup>52</sup> Section 1(5) of the Charging Orders Act 1979 provides that: ‘In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to - (a) the personal circumstances of the debtor; and (b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.’

<sup>53</sup> Fox LJ stated that: ‘[i]t seems to me that “the personal circumstances of the debtor” would include the fact that he is obliged to make provision for his wife and young children, that he has no property with which to do so apart from the equity of his share of the matrimonial home, and that his former wife has no resources of her own of any consequence.’; *Harman v Glencross* (CA) above n 49 at 657, *per* Fox LJ. A similar sentiment was expressed in *Interpool v Galani* [1988]1 QB 738, where the court indicated its reluctance to make a charging order relating to a debtor’s interest in his matrimonial home on the basis of the debtor’s obligation to provide for his family.

<sup>54</sup> *Harman v Glencross* (CA), above n 49 at 651, *per* Balcombe LJ.

<sup>55</sup> *Ibid.*

<sup>56</sup> K. O’Donovan, ‘Protection and Paternalism’ in M.D.A. Freeman (ed) *The State, the Law and the Family: Critical Perspectives* (1984) at 87. O’Donovan goes on to state that: ‘[t]he crucial factor, however, is to provide the necessary “special protection” without implying that women lack full competency or sanctioning submission and control.’

<sup>57</sup> A. Bottomley, ‘Women, Family and Property: British Songs of Innocence and Experience’ in M. Maclean, and J. Kurczewski, *Families, Politics and the Law* (1994) at 261.

<sup>58</sup> *ibid* at 264.

<sup>59</sup> *Jones v Challenger*, above n 32.

<sup>60</sup> *Re Soloman, a Bankrupt*, above n 33.

<sup>61</sup> ‘Economic theories as well as legislative doctrines treat the family as a private economic unit and avoid the fact that opposite interests might exist *within* the same entity...the family institution is supposed to function in harmony after the contract is signed and until the relationship has possibly deteriorated to the extent that a disclosure is necessary.’; T.S. Dahl, and A. Snare, ‘The Private sector and the ‘invisibility’ of women’ in C. Smart, & B. Smart, (eds) *Women, Sexuality and Social Control* (1978) at 18.

<sup>62</sup> Law Commission, *Sharing Homes: A Discussion Paper* (2002, London: HMSO).

<sup>63</sup> *ibid* para 1.8.

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<sup>64</sup> *Ibid* at para 1.8.

<sup>65</sup> HL Debs vol. 569, col. 1722 (1 March 1996), Lord Mackey.

<sup>66</sup> *ibid*; see further, L. Fox, 'Living in a Policy State: From Trust for Sale to Trust of Land' (2000) *Liverpool Law Review* 59.

<sup>67</sup> *A v B*, 23 May 1997, Unreported, Transcript: Lexis; *TSB Bank plc v Marshall* [1998]39 EG 208; *Bank of Ireland Home Mortgages Ltd v Bell* [2001]2 FLR 809; *First National Bank plc v Achampong and others* [2003]EWCA Civ 487.

<sup>68</sup> [2001]2 FLR 809.

<sup>69</sup> [2004]EWHC 1745.

<sup>70</sup> *Ibid*, para 29.

<sup>71</sup> *Ibid*.

<sup>72</sup> The mortgagee has an automatic power to conduct an out-of court sale where the mortgage was made by deed, and the criteria set out in sections 101-103 of the Law of Property Act 1925 (LPA) have been satisfied: that legal date of redemption, as specified in the mortgage deed, has passed and that either: (i) there has been a default in the payment of the mortgage money for three months after notice requiring payment is served; or (ii) interest under the mortgage is in arrear and unpaid for two months; or (iii) there has been a breach of some other provision contained in the mortgage deed.

<sup>73</sup> Section 91(2) of the LPA provides that in an action for sale of the property the court may direct a sale of the mortgaged property, on such terms as it thinks fit.

<sup>74</sup> Fisher & Lightwood, *Law of Mortgage* (11<sup>th</sup> Edn, 2002), para 21.8.

<sup>75</sup> (1997)31 HLR 721.

<sup>76</sup> The bank wished to delay the sale for the property in the hope of reducing the negative equity.

<sup>77</sup> Administration of Justice Act 1970, section 36(1).

<sup>78</sup> See for example, *Cheltenham & Gloucester Building Society v Norgan* [1996]1 WLR 343.

<sup>79</sup> The origins of expressions for home in the Roman (*domus*) and Greek (*domos*) languages were those of: '...very similar words arrived at in classical languages by different routes. The Romans got their *domus* from the Old Indo-European root *dem*, family; while the Greeks derived it from exactly the same-sounding root, meaning to build.'; J. Rykwert, 'House and Home' in A. Mack (ed), *Home – A place in the world* (1993) at 48. Rykwert suggests that although the fact that: '...the two different

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words moved so close together, linguists now tell us, was a coincidence...it seems to me to indicate an affinity which is not just accidental.’; *ibid*.

<sup>80</sup> T. Hareven, ‘The Home and the Family in Historical Perspective’ in Mack (ed), above n 79 at 228. Lawrence also argues that: ‘...conceptions of family, households, and domestic space have varied over time...the close association between the family and a place of domicile is relatively recent.’; R.J. Lawrence, ‘Deciphering Home: An Integrative Historical Perspective’ in Benjamin (ed), above n 3 at 58-59.

<sup>81</sup> ‘...home was the invention of the middle class and was closely related to the emergence of the family as a private, emotional entity.’; *ibid* 258. See also L. Davidoff & C. Hall, “‘My own fireside’: the creation of the middle-class home’, in S. Jackson & S. Moore (eds), *The Politics of Domestic Consumption: Critical Readings* (1995) Chapter 5.1.

<sup>82</sup> Watson, above n 5 at 26.

<sup>83</sup> Hareven links the emerging concept of family home with: ‘...the new ideals of domesticity and privacy that were associated with the characteristics of the modern family - a family that was child-centered, private, and in which the roles of husband and wife were segregated into public and domestic spheres, respectively.’; above n 80 at 232.

<sup>84</sup> ‘The husband was expected to be the main breadwinner and worker outside the home, and the wife a full-time housekeeper and mother. This new separation of domestic and public spheres led to the rearrangement of the family’s work and living patterns within the home...the world of work became separate from family activities.’; *ibid* at 233.

<sup>85</sup> G. Wright, ‘Prescribing the Home Model’ in Mack (ed), above, n 79.

<sup>86</sup> W. Webster, *Imagining Home: Gender, Race and National Identity, 1945-64*, (1998), 58.

<sup>87</sup> *Ibid*, preface, x.

<sup>88</sup> *ibid*. ‘Englishness was represented in images of family and home which were portrayed as white. Black was not associated with domestic and familial life except through its connections with this white family – connections which were usually seen as threatening.’; Webster, above n 86 at 47.

<sup>89</sup> *Civil Partnership: A framework for the legal recognition of same-sex couples* (June 2003), <http://www.womenandequalityunit.gov.uk/research/index.htm#civilpartnerships>.

<sup>90</sup> Law Society for England and Wales, *Cohabitation: The Case for Clear Law, Proposals for Reform*, (July 2002). This paper proposes a second layer of rights, for unmarried heterosexual cohabitants, and

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unregistered homosexual cohabitants. In relation to family property, the Law Society focused on the rights of non-property owning partners on separation.

<sup>91</sup> Occupation was protected independently of ownership, according to one commentator, on the basis that: ‘Men generally fix their affections more on what they are possess’d of than on what they never enjoyed...it would be greater cruelty to dispossess a man of anything than not to give it to him.’; D. Hume, *A Treatise on Human Nature*, (Reprinted from the original edition, 1928), Book III, Part II, Section I.

<sup>92</sup> M. J. Radin, ‘Property and Personhood’ (1982)34 *Stanford Law Review* 957.

<sup>93</sup> Radin, above n 92 at 959. Radin also argued that: ‘...the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty.’; *ibid*, at 957.

<sup>94</sup> Radin, above n 92 at 978; ‘...a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum.’, *ibid*, 987. Radin went on to argue that: ‘[o]ne may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss.’; at 959. In relation to the ‘personhood’ quality of homes, this is borne out by empirical studies focusing on the impact of losing one’s home, which have identified extreme responses including alienation and grief amongst those who had lost their homes; see also R.J Lawrence, ‘Deciphering Home: An Integrative Historical Perspective’ in Benjamin (ed), n 3 above, 61-62; M. Fried, ‘Grieving for a Lost Home’ in L.J Duhl, (ed) *The Urban Condition – People and Policy in the Metropolis* (1963); J.D Porteous, ‘Domicide: The Destruction of Home’ in Benjamin (ed), n 1 above. These findings were supported by J. Ford *et al*, *Home ownership in a Risk Society: A social analysis of mortgage arrears and possessions* (2001) where loss of home following mortgage repossession was linked to feelings of sadness, loss, insecurity, and sometimes damage to health.

<sup>95</sup> See above, notes 1-4 and associated text.

<sup>96</sup> The proposition that families may have *less* need of home as a source of continuity if their home meanings travel with them, is supported by evidence that, for children at least, the ‘experiential home’ may travel with the child. Empirical evidence from a child who had lived in 8 different properties, indicated that despite the family’s mobility, that child: ‘...only had one experiential home in my childhood; my experiential home seems to have traveled with me and constantly transformed into new physical shapes as we moved.’; Pallasmaa, above n 3 at 135.

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- <sup>97</sup> This sum is currently NZ\$82,000, Joint Family Homes (Specified Sum) Order 1996, SR 1996/175.
- <sup>98</sup> Family Law Act 1986, section 21.
- <sup>99</sup> Land (Spouse Protection) Act 1996.
- <sup>100</sup> Dower Act 2000.
- <sup>101</sup> Homesteads Act 1992.
- <sup>102</sup> Marital Property Act 1980.
- <sup>103</sup> Family Law Act 1995.
- <sup>104</sup> Quebec Civil Code.
- <sup>105</sup> Family Law Act 1990.
- <sup>106</sup> *Bunreacht na hEireann*, (The Irish Constitution) Article 41.
- <sup>107</sup> *Bunreacht na hEireann*, Article 41.2.1.
- <sup>108</sup> Davis, *Introduction to Real Property* (1979) at para 8.11.
- <sup>109</sup> (2000)ACWS (3d) 287.
- <sup>110</sup> See for example, *Miron v Trudel* [1995]2 SCR 418; *M v H* (1996)40 CRR (2d) 240; *Watch v Watch* (1999)67 CRR (2d) 311.
- <sup>111</sup> It is noteworthy however that a ‘domestic partnership declaration’ must be executed before cohabitants come within the remit of this homestead scheme.
- <sup>112</sup> The only states offering no exemption are Delaware, New Jersey, Pennsylvania, and Rhode Island. The amount of the exemption ranges from \$500 in Iowa, to \$200,000 in Minnesota, with five States (Florida, Kansas, Oklahoma, South Dakota, Texas) offering total exemption.
- <sup>113</sup> See generally, J.L. Baker, ‘Comment: The Texas Homestead Exemption’s Near Ban on Home Equity Lending: It’s Time for the People to Decide’ (1996)33 *Houston Law Review* 239.
- <sup>114</sup> J.W. McKnight, ‘Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle’, (1983)86 *Southwestern Historical Quarterly* 369.
- <sup>115</sup> *Wood v Wheeler* 7 Tex. 13, 22 (1851), Hemphill CJ.
- <sup>116</sup> See generally, L. Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge’ [2002]29 *Journal of Law and Society* 580-610.
- <sup>117</sup> 18 Tex. 412.
- <sup>118</sup> *ibid* at 415-416, cited in Baker, above n 113, footnote 94.

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<sup>119</sup> Baker, above n 113 at 257. Section 50 of Article XVI of the Texas Constitution states that: ‘The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for...[the section then sets out permitted encumbrances].’ Section 51 of the Texas Constitution now permits that a ‘homestead claimant’ may be: ‘...a single adult person, or the head of a family.’

<sup>120</sup> The head of the family must be legally or morally obligated to support at least one other member of the family, and there must be a corresponding dependence by the other family member for this support; *NCNB Texas Bank v Carpenter*, 849 S.W. 2d 875, 879 (Tex.Civ.App. Fort Worth 1993); relationships accepted as showing ‘family’ have included adult child and parent, *NCNB Texas Bank v Carpenter*, above; brother and sisters, *Real Estate Land Title & Trust Co v Street* 85 S.W. 2d 341; divorced parent and minor child, *Renaldo v Bank of San Antonio* 630 S.W.2d 638, 639 (Tex. 1982); and a widower with no dependent children, *Border v McDaniel* 70 F.3d 841, 844 (5<sup>th</sup> Cir. 1995). See M.T. Curry, ‘An Overview of the Texas Homestead Law’,

[http://library.lp.findlaw.com/articles/file/00494/001069/title/subject/topic/bankruptcy%20law\\_collections%20%20repossessions/filename/bankruptcylaw\\_1\\_24#N\\_21\\_](http://library.lp.findlaw.com/articles/file/00494/001069/title/subject/topic/bankruptcy%20law_collections%20%20repossessions/filename/bankruptcylaw_1_24#N_21_).

<sup>121</sup> *In re Mitchell* 132 BR 553 (Bankr. W.D. Tex. 1991).

<sup>122</sup> Vernon, *Interpretative Commentary to the Texas Constitution*, (1993) art XVI, sections 49-50, cited in Baker, above n 113 at footnote 94

<sup>123</sup> Barlow has argued, in support of a modified community property scheme, that: ‘[r]estricting the availability of the family home as an easy means of security business credit, and reducing its attractiveness to lenders by the risk of continued occupation rights in the family home, are consequences...which commercial vested interests may oppose. Yet forcing creditors to inform and consult a client’s partner, consider business plans more thoroughly and ultimately find other suitable means of guaranteeing loans are outcomes worth pursuing in the interests of family life.’ A. Barlow, ‘Rights in the Family Home – time for a conceptual revolution’ in A Hudson (ed) *New Perspectives on Property Law, Human Rights and the Home* (2004) at 75.

<sup>124</sup> ‘Lending is their job...it is also the main cause of why they sometimes lose money.’; ‘Creditor and Economic Policy’, Deputy Governor’s speech at the Institute of Credit Management National Conference, 9<sup>th</sup> March 1994; reprinted in *Bank of England Quarterly Bulletin*, May 1994. The Committee on Bankruptcy and Insolvency has also acknowledged that: ‘[i]n the ordinary consequence

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of human experience the creation of credit must involve the possibility that the credit may in the event be misplaced, resulting in a debt which is not recoverable in full.’; above n 36, para 5.

<sup>125</sup> An illustration of the ability of creditors to protect their own interests is provided by the *Boland* litigation. Although the decision in *Boland* (above n 9) caused some alarm on behalf of both creditors and conveyancers with regard to its deterrent effect on the grant of mortgages, the alleged difficulties were described by Lord Scarman as ‘exaggerated’: ‘...bankers, and solicitors, exist to provide a service which the public needs. They can – as they have successfully done in the past – adjust their practice if it be socially required.’; *Boland*, above n 9 at 510. By 1987 the Law Commission conceded in relation to *Boland* that: ‘...conveyancers have learnt to live with it...’; *Third Report on Land Registration*, Law Com No 158 (1987) at para 2.63.

<sup>126</sup> See for example, Ford *et al*, above n 94.

<sup>127</sup> See for example the decision in *White v White* [2000]FLR 981, which established a ‘yardstick of equality’ for the division of assets between a wealthy breadwinner husband and a homemaker wife when property adjustment orders are made on divorce.

<sup>128</sup> The bases for this ‘added value’ were the presence of children, or the value placed on ‘family life’ within the home by occupiers.

<sup>129</sup> J. Lewis, ‘Family Policy in the Post-War Period’, in S.N. Katz, J. Eekelaar, and M. Maclean, *Cross Currents: Family Law and Policy in the United States and England* (2000) at 82.

<sup>130</sup> S.N. Katz, ‘Individual Rights and Family Relationships’ in Katz, *et al*, above n 129 at 621.

<sup>131</sup> Lewis discusses a number of concerns associated with the trend towards greater individualization in family policy, particularly in relation to the interests of lone mothers and children: see Lewis, above n 129; while O’Donovan has argued that it is important not to lose sight of the: ‘...danger in raising individual autonomy in opposition to protective legislation in that this ignores the fact that family responsibilities, however, voluntarily taken on, deprive individuals of autonomy.’; above n 56 at 85.

<sup>132</sup> Katz, above n 130 at 621.

<sup>133</sup> Katz states that: ‘I believe this emphasis on individual rights is a positive development, leading to a new concept of the marriage relationship.’; *ibid* at 622.

<sup>134</sup> *Sharing Homes*, above n 62, para 3.71.

<sup>135</sup> T. Wikstrom, ‘The Home and Housing Modernisation’ in D. N. Benjamin, above n 3 at 268.

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<sup>136</sup> The argument that children should be ‘counted’ as individual occupiers is in line with current approaches towards children’s rights, which emphasise the position of children as citizens and ‘rights-bearing individuals’ and as autonomous legal subjects; see, for example, ‘Children, Citizenship and Family Practices’ in C. Smart, B. Neale, & A. Wade, *The Changing Experience of Childhood: Families and Divorce* (2001).

<sup>137</sup> If interests in the home were valued according to the individual’s attachment to the property, it would not be necessary to define the home interest by reference to relationships with other people, thus avoiding both the exclusionary issues and the presumptions of dependency discussed above.

<sup>138</sup> Fitchen, above n 1 at 315.

<sup>139</sup> S. Saegert, & G. Winkel, ‘The Home: A Critical Problem for Changing Sex Roles’ in G.R. Wekerle, R. Peterson, & D. Morley, *New Space for Women* (1980) at 41.

<sup>140</sup> S. Kent, ‘Ethnoarchaeology and the Concept of Home: A Cross-Cultural Analysis’, in Benjamin (ed), above n 3 at 163, emphasis added.

<sup>141</sup> See Fox, above n 116.